AUG
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 36

EDGAR LABAT,

Petitioner,

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

RUDOLPH F. BECKER, JR.,
FELICIEN Y. LOZES,
Attorneys for Petitioner.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	3
Statement	4
Summary of Argument	7
Argument	8
Conclusion	24
Appendix "A"	26
Appendix "B"	27

CITATIONS

Cases:

Avery v. *Alabama* (1940), 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321	10
Carter v. *Texas*, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839	22
Davis v. *Wechsler*, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143	22
Hauck v. *Olson* (1945), 362 U.S. 271, 90 L.Ed. 61, 66 S.Ct. 166	10
Hernandez v. *Texas*, 347 U.S. 667, 74 S.Ct. 667, 98 L.Ed. 866	22
Johnson v. *U.S.*, 110 F. 2d 562 (1940)	11
Patton v. *Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76	22
Powell v. *State of Alabama*, 287 U.S. 45, 53 S.Ct. 55 (65), 77 L.Ed. 158	10
Rogers v. *Alabama*, 192 U.S. 226, 24 S.Ct. 257, 74 L.Ed. 870	22
State v. *Chianelli*, 226 La. 552, 76 So. 2d 727 (1955)	18
State v. *Labat, et al.*, 226 La. 201, 75 So. 2d 333 (1337)	1, 7, 19, 20
State v. *Michel*, 225 La. 1040, 74 So. 2d 207	18

Page

State v. Poret, No. 41718, 226 La. 201, 75 So. 2d 333 1
State v. Revells, 31 La. Ann. 387 (1879) 24
State v. Smith, 31 La. Ann. 406 (1879) 24
State v. Wilson, 204 La. 24, 14 So. 2d 873, 885, 889 (1943) 17, 20
U.S. ex rel. Foley v. Ragen, 52 F. Supp. 265 (1943) 11
U.S. ex rel. Hall v. Ragen, 60 F. Supp. 820 (1945) 11
Ward v. Love County, 253 U.S. 17, 64 L.Ed. 753 23
White v. Ragen, 324 U.S. 760, 764, 89 L.Ed. 1348, 1352, 65 S.Ct. 978 10
Williams v. Georgia, — U.S. 75 S. Ct. 814, 828, 99 L.Ed. 702 (1955) 15
Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 389 10

Statutes:

United States Constitution, Amendments V, VI, XIV 11, 15
Louisiana Code of Criminal Procedure:
Article 42, L.S.A., R.S. 14:42 4
Article 202, L.S.A., R.S. 15:202 2, 6
Article 501, L.S.A., R.S. 15:501 6
28 U.S.C.A. 1257 (3) 2

Miscellaneous:

Louisiana Law Review, XIV, 17, 20-21, December, 1953; XV, 749, 751, 754; June, 1955 15
18 Tulane Law Review, 462, (481) 1944 12, 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 36

EDGAR LABAT,

Petitioner,

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF ON BEHALF OF PETITIONER, EDGAR LABAT

Opinions Below

The opinion of the Supreme Court of Louisiana is reported in *State of Louisiana v. Edgar Labat & Clifton Alton Poret*, No. 41718, 226 La. 201, 75 So. 2d. 333.

Jurisdiction

The judgment of the Supreme Court of Louisiana was handed down on July 2, 1954. *State v. Labat, et al*, 226 La. 201, 75 So. 2d. 333. Rehearing was denied on October 5, 1954. The petition for writ of certiorari was filed on December 31, 1954. The petition was granted on February

28, 1955, 348 U.S. 950; 75 S.Ct. 444, 99 L.Ed. 307. No. 396 Misc. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257(3).

Statute and Constitutional Provisions Involved

Article 202 of the Louisiana Code of Criminal Procedure — Louisiana Statutes Annotated, R. S. 15:202:

Time for urging objections to array; waiver

All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, *heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

CONSTITUTION OF THE UNITED STATES

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.*

Questions Presented

1. Whether petitioner was denied his constitutional right to be represented by effective counsel.

2. Whether petitioner intelligently waived his right to challenge the venire under the circumstances of being represented by ineffective counsel in a complex and difficult legal situation.

3. Whether this Court should assume jurisdiction in this case because there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner his right to challenge the grand jury on the ground of systematic exclusion of negroes therefrom.

F. In the event that this Court should see fit to remand the case of the co-defendant, Clifton Alton Poret, on grounds not asserted herein, should not the Court also remand this case.

Statement of the Case

On December 11, 1950, the grand jury for the Parish of Orleans, State of Louisiana, returned an indictment against petitioner Edgar Labat, a colored male, and against one Clifton Alton Poret, also a colored male, charging them with the crime of aggravated rape, denounced by Article 42 of the Louisiana Criminal Code, Louisiana Statute Annotated R. S. 14:42. The victim of the alleged rape was alleged to be one Helen Rajek, a white female, and the crime was allegedly committed on November 12, 1950.

The petitioner, Edgar Labat, was arrested in New Orleans a few days after the date of the alleged crime. The co-defendant, Poret, was not arrested until almost two years following the commission of the alleged crime.

On January 3, 1951, defendant, Edgar Labat, was brought before the Court *for arraignment without counsel*. The minute entries show that he pleaded "not guilty". In response to a query by the Court, defendant Labat informed the Court that his family was attempting to hire counsel for his defense (Tr. 1). Two days later on January 5, 1951, the defendant Labat was again brought before the Court, and the Court appointed E. I. Mahoney, Esq. as counsel to represent him (Tr. 1). It is to be noted that at this time the co-defendant, Poret, was not before the Court and had not been arrested or apprehended. After this appointment of counsel by the Court, nothing whatever was done, according to the record, by either the State or the defense for more than one year. *The court-appointed counsel for Labat did nothing whatever in his behalf. He filed nothing until one year and twenty-four (24) days later*, namely on January

29, 1952, *when he filed a Motion to Withdraw as Counsel* (Tr. 2). On this day the State moved for a continuance, which was granted. The case was again continued to be reset on Motion of the State on March 25, 1952 and on June 17, 1952. It is not clear from the record exactly when petitioner's employed counsel, Mr. G. Wray Gill, came into the case. In any event, it was not until October 27, 1952, almost one year and eleven months subsequent to the indictment of petitioner Labat, that his co-defendant, Clifton Alton Poret, was brought before the Court for arraignment (Tr. 3).

On November 7, 1952, petitioner Labat, through his counsel, G. Wray Gill, filed a Motion to Quash the indictment against him on the grounds that there had been a systematic, unlawful and unconstitutional exclusion of negroes from the general venire and grand jury panel and Grand Jury which returned the indictment against him. *The Motion alleged* that the exclusion existed because of race or color, and *that a negro has never served on a Grand Jury in the Parish of Orleans.* Subsequently, on November 18, 1952, petitioner Labat, through his counsel, G. Wray Gill, filed a supplemental and amended Motion to Quash, which after re-alleging all of the facts contained in the original Motion to Quash, alleged that petitioner was a member of the colored or negro race, and that although petitioner was represented by a court-appointed counsel since shortly after his arraignment, he was not represented by his employed counsel until (the date is not made clear from the record), but that under the circumstances and because of the fact that the alleged principal and co-defendant was not in the jurisdiction of the Court or arraigned, it was not consistent or possible for him to have filed his Motion to Quash prior to the date on which he had filed said Motion.

To both the original and supplemental Motions to Quash, the State of Louisiana filed *Demurrers* contending that the grand jury, which indicted petitioner, was constitutionally selected without discrimination or systematic exclusion of any race, group or class of people, and further that the *Motion to Quash was filed too late* under the provisions of *Article 202 of the Louisiana Code of Criminal Procedure, L. S. A., R. S. 15:202.*

Petitioner Labat also filed a Motion attacking the constitutionality of said *Article 202. The Court overruled all of petitioner's Motions without permitting petitioner to introduce any evidence in connection with the alleging of systematic exclusion of negroes from the grand jury, on the ground that petitioner's Motion came too late to be considered. See Judge's Percuriam to Bills of Exceptions Nos. 3, 4, 5 & 6* (Tr. 50). Proper Bills of Exception were reserved and petitioner was ordered to stand trial.

On February 24, 1953, your petitioner and his co-defendant were tried and on February 27, 1953 the jury returned a verdict of guilty as charged against both your petitioner and his co-defendant. During the course of the trial, petitioner reserved and perfected twenty-seven bills of exception. These bills were reserved in accordance with the provisions of *Article 501 of the Louisiana Code of Criminal Procedure, L. S. A., R.S. 15:501*, providing that whenever a bill of exception has been reserved in any criminal proceedings in which more than one defendant is on trial, there shall be presumed, unless the contrary clearly appears, that the bill was reserved by all of the defendants on trial.

On March 13, 1953, petitioner filed a Motion for a new trial and on March 23, 1953, the Motion for a new trial was denied and bills of exception were reserved. On this same day, petitioner filed a Motion for a Suspensive Appeal to the Supreme Court for the State of Louisiana, which Mo-

tion was granted. Petitioner and his co-defendant were then on this same day *sentenced to death in the electric chair.*

On July 2, 1954, the Supreme Court of Louisiana affirmed and sustained the conviction and sentence of the trial court. Subsequently, petitioner filed an application for rehearing with the Supreme Court of Louisiana, which application for rehearing was refused and denied on October 5, 1954. *State* v. *Labat, 226 La. 201, 75 So. 2d 333.*

A petition was then filed with the Supreme Court of Louisiana for a stay of execution in order that petitioner might file an application for a Writ of Certiorari to the Supreme Court of the United States, which petition for stay of execution was granted on the 8th day of October, 1954.

Petitioner filed application for Writ of Certiorari with the Supreme Court of the United States on December 31, 1954. The petition was granted on February 28, 1955. *348 U. S. 950, 75 S. Ct. 444, 99 L. Ed. 307, No. 396 Misc.*

Summary of Argument

I. Petitioner was denied due process of law by the State of Louisiana in that from the time of his arraignment to more than one year later, he was without the assistance of "effective counsel". The court-appointed counsel did absolutely nothing in his behalf during the entire time that counsel's name was of record. The Louisiana Court then held that petitioner's right to challenge the Grand Jury that indicted him on the grounds of systematic exclusion of negroes had prescribed during this period of time.

II. The legal issue confronting petitioner during the time that he was without the assistance of "effective counsel" was of such complexity that he could not have intelligently waived his rights.

III. There was no independent and adequate state ground supporting the conclusion reached by the trial judge and the Supreme Court of Louisiana in denying petitioner the right to challenge the Grand Jury on the ground of systematic exclusion of negroes. The Supreme Court of Louisiana has in subsequent cases admitted that its construction of the Articles of the Louisiana Code of Criminal Procedure, under which petitioner's rights were denied, was a "strained construction" and amounted to "judicial legislation."

IV. In the event that this Court should see fit to remand the case of the co-defendant herein, so as to permit co-defendant to challenge the validity of the Grand Jury on some ground not asserted by petitioner herein, then the Court should also remand petitioner's case. A motion to set aside the venire, if sustained, on behalf of co-defendant would have the effect of declaring the venire bad and illegally drawn and the jurors composing it no longer jurors, and no indictment by them would stand.

Argument

I.

Petitioner Labat respectfully submits to this Honorable Court that he was denied due process of law in violation of his rights under the *Fourteenth Amendment to the Constitution of the United States* in that for a period of approximately one year, during which time his right to challenge the array, the venire and the grand jury which indicted him on the ground of systematic exclusion of members of his race, was prescribing under the interpretation given to *Article 202 of the Code of Criminal Procedure of Louisiana, he was without "effective counsel".*

The facts, as disclosed by the record, indicate that petitioner, Labat, was arraigned on January 3, 1951 without

counsel, at which time he pleaded "not guilty". In response to questioning by the Court, he informed the Court that his family was in the process of hiring counsel for his defense. The Court then gave petitioner two days in which to obtain counsel. It must be pointed out here that petitioner Labat is a negro who had worked as an orderly in a hospital, and whose family resided in the neighboring State of Mississippi. He was, therefore, of very limited means and under the circumstances, the hiring of competent counsel by members of his family was a difficult matter. The record in no way indicates that the Court impressed petitioner with the fact that his right to challenge the grand jury was prescribing with the lapse of time. The record merely discloses that two days later, on January 5, 1951, the Court appointed Mr. E. J. Mahoney to represent petitioner. Mr. Mahoney was an elderly lawyer, who was then in poor health, a fact which was known to the Court as Mr. Mahoney's office was in a small house directly across the street from the front steps of the courthouse, and Mr. Mahoney was an almost daily visitor to the Court. The record indicates with an eloquent silence that Mr. Mahoney's appointment by the Court was merely formal and made by the Court solely to satisfy the record and show that petitioner was represented by counsel. The record discloses that Mr. Mahoney did *nothing whatever* on behalf of defendant for a period of more than one year. In fact, the only appearance made in the case by Mr. Mahoney from the time of his appointment on January 5, 1951 until January 29, 1952 was a Motion by Mr. Mahoney *to be allowed to withdraw his name as counsel of record.*

The reason for the court-appointed attorney's inaction is not disclosed by the record. Whether it was because of ill health or some other reason is not indicated. It is a fact which was known to the trial judge who appointed the attorney that the court-appointed attorney was confined to

his bed with a heart ailment on May 12, 1951 and there he remained for a period of approximately seven months before he resigned from the case. Certainly during this period petitioner was *in fact* without counsel.

It is submitted that the absence in the record of any attempt by petitioner's court-appointed attorney to assert his rights under the Constitution conclusively shows that the court's appointment of an attorney was merely formal and did not *in fact* give him the assistance of counsel at these crucial states of the proceedings against him, and, therefore, denied him due process of law.

> The right to counsel * * * is * * * protected by the Fourteenth Amendment. *Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 389.*

Your Honors have also held that the constitutional guarantee of a right to counsel cannot be satisfied by *mere formal appointment* of counsel. *Avery* v. *Alabama* (1940), 308 U. S. 444, 84 L. Ed. 377, 60 S. Ct. 321. It has also been held that it is the duty of a Court to assign counsel in a proper situation and that "* * * that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case". *Powell* v. *State of Alabama*, 287 U. S. 45, 53 S. Ct. 55 (65), 77 L. Ed. 158.

The right to counsel includes the right to have "effective counsel" assigned. *Hawk* v. *Olson* (1945), 362 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 166; *White* v. *Ragen*, 324 U. S. 760, 764, 89 L. Ed. 1348, 1352, 65 S. Ct. 978.

Petitioner submits that an application of the above rule was accurately made by the Court of Appeals of the District of Columbia, in a case wherein attorneys appointed by the Court handled the case in a careless manner without even examining the transcript and summoning available witnesses. The Court held that "in the circumstances, the

failure of counsel to produce all available evidence in a case involving the life of an accused should not be held against him. It would be a strange system of law which first assigned an inexperienced or negligent counsel in a capital case and then made counsel's neglect a ground for refusing a new trial. The right to counsel is not formal but substantial." *Johnson* v. *U. S.*, 110 F. 2d 562 (1940).

> The right to assistance of counsel means more than the nominal designation by the Court of a lawyer to represent the accused and the mere perfunctory participation in the trial of such appointee as attorney for the defendant. It means rather that the accused is entitled to the good faith and assistance of a lawyer in defending the accused against the indictment on which he is to be tried. *U. S. ex rel. Foley* v. *Ragen*, 54 F. Supp. 265 (1943).

The holding of the Court in *U. S. ex rel. Hall* v. *Ragen*, 60 F. Supp. 820 (1945) is also interesting to note. In this case, at arraignment the Court appointed an attorney for the defendant who never interviewed him or *took part in any subsequent proceedings*. Thereafter, a doctor, who was a disbarred attorney, represented the defendant at a trial. The Court concluded that the defendant was not afforded a fair trial in accordance with the Fourteenth Amendment to the Constitution of the United States.

Petitioner therefore submits that the failure of the Court to provide "effective counsel" during a period when according to that same court's interpretation of the procedural law of Louisiana, the time within which he might assert a Federal Constitutional right, prescribed, denied him of due process of law.

II

The legal issue with which petitioner was faced was of such complexity and difficulty that he could not have intelligently waived his rights to assert same.

At the outset it must be noted that petitioner is an ignorant negro, born and reared in the State of Mississippi, who came to New Orleans upon reaching manhood, and obtained a job as a hospital orderly.

Petitioner Labat was an alleged accessory to the alleged rape and nowhere in the record is there any testimony indicating that petitioner Labat was a principal in the commission of the alleged crime. There is nothing in the record to indicate that your petitioner Labat actually committed a rape, he was indicted as a principal only under the theory of Louisiana law that an accessory may be indicted and tried along with a principal as a principal.

It is to be noted that from the time that petitioner was arraigned, and the court-appointed attorney was named to represent him, his right to challenge the venire and the grand jury on the ground of systematic exclusion of members of his race was slowly prescribing as each day passed according to the interpretation placed upon various *Articles of the Louisiana Code of Criminal Procedure* by the Supreme Court of Louisiana. These are interpretations which, as is pointed out in an article in the Tulane Law Review, "are so phrased as to give rise to such conflicting interpretations that a defendant with bonafide grounds for objection, unable to determine which article is applicable to his case, or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code Article or giving it a different interpretation from that of the Supreme Court". *18 Tulane Law Review, 462, 481 (1944).*

Professor Dale E. Bennett of Louisiana State University, an outstanding authority on Criminal Law and Procedure in Louisiana, sets forth the difficult legal situation in a recent article from which we quote:

> Another source of considerable difficulty and dissatisfaction has been the requirement of Article 202 that objections to the general venire or jury lists must be urged "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard". This article is apparently aimed at securing prompt objections to jury venires and jury lists, but it presents a cure which is distinctly worse than the situation which it purports to remedy. Insofar as it relates to objections to the grand jury panel there is apparent conflict with other articles which permit the filing of objections to the indictment at any time prior to the commencement of the trial. As applied to the time for objecting to petit jury venires, it states a rule which also frequently proves unworkable.

The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. *However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions.* Article 284 states that such objections must be taken "before the arraignment". Article 287 declares that the demurrer and motion to quash "must be filed, tried and disposed of before trial on the merits." Even more latitude is apparently contem-

plated by the declaration in Article 253 that objections to the indictment must "be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit." *In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202,* certain fairly definite conclusions emerge from a careful analysis of the above provisions. The defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to plead otherwise. In such cases, Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the merits. While Article 253 authorized the judge to permit the filing of a motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combina-

tion of Articles 284 and 287 would effect such clarification. At any rate, Article 202 should be eased out of the picture in this regard.

Louisiana Criminal Procedure—a critical appraisal, XIV Louisiana Law Review - 17 - 20 - 21, December, 1953.

It is to be noted that the above pattern, which the Professor states would be "well set to the veteran criminal lawyer or trial judge", ignored "the possible complication of *Article 202.*" (Page 19 last three lines). Yet your petitioner was denied his right to challenge the array, the venire or the grand jury that tried him on the ground of systematic exclusion of negroes for the reason that, according to the trial judge and the Supreme Court of Louisiana, his motion to quash was filed "too late", according to the provisions of *Article 202.*

In view of the above, it is submitted that your petitioner could not have intelligently waived his right to challenge the grand jury and the venire at a time when although he had the nominal assistance of a *court-appointed counsel*, he was *in fact* without the assistance of counsel to advise him of his right timely to make the challenge, as the *court-appointed counsel* did nothing whatever on petitioner's behalf.

III

This Court should assume jurisdiction in this case because there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner his right to challenge the array, the venire and the grand jury on the ground of systematic exclusion of negroes therefrom.

As was stated by the minority of the Court in the recent case of *Williams v. Georgia*, ——U.S. ——, 75 S. Ct. 814,

828, 99 L. Ed. 702 (1955), a purported state ground is not independent and adequate in two instances. First where the circumstances give rise to an inference that the state court is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. Second, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

It is submitted that both of the above tests are applicable in petitioner's case. The record indicates that petitioner's motion to quash the indictment was held by the trial court and the Supreme Court of Louisiana to have been filed "too late", according to the provisions of *Article 202 of the Louisiana Code of Criminal Procedure*. Petitioner then urged by way of a motion in writing that said Article was patently unconstitutional. Said Article provides as follows:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the *third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.
>
> *Louisiana Statutes Annotated, R.S. 15:202.*

If the Article be interpreted *as passed by the legislature*, "the third judicial day of the term for which said jury shall have been drawn", had expired long before the alleged crime was committed. The Grand Jury which indicted

your petitioner was impaneled on September 5, 1950 and, therefore, under the *Article as written*, your petitioner had until *September 8, 1950* in which to file the objection to the array or venire.

This he obviously could not do as the alleged crime was not committed until more than two months later on *November 12, 1950*, and defendant was not indicted until *December 11, 1950*, more than three months after the date for objecting to the array or venire had elapsed, *according to the Article as written*.

However, the Louisiana Supreme Court in the case of *State* v. *Wilson*, 204 La. 24; 14 So. 2d., 873 interpreted the above plain language to mean the *third day after* the end of the term of the Grand Jury.

This interpretation by the Supreme Court gave rise to the following comment in the *Tulane Law Review* branding it as an interpretation which can be used as a "means of sidetracking the issue of race discrimination in selecting juries".

We quote:

> "Today when grand jury terms and court terms do not coincide, the language of Article 202 fails far short of making clear the legislative intent with regard to this important limit on a defendant's rights. As long as the articles of the Code are so phrased as to give rise to such conflicting interpretations, a defendant with *bona fide* grounds for objection, unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the Supreme Court. *In its present ambiguous form, this Article is one source of confusing technicalities of procedure in*

criminal cases which can be used as a means of side-tracking the issue of race discrimination in the selecting of juries. To protect the rights of an accused person in Louisiana, it is suggested that the legislature clarify *Article 202*, making plain its scope and the extent of the time limitation it imposes. The general explanation in the present Article of the type of objection covered is inadequate, particularly if the interpretation of prior statutes on the same subject cannot be relied on. Just what objections must be urged within the strict time limit of *Article 202* rather than the more extended period allowed by subsequent articles on quashing indictments generally should be made clear. The apparent conflict among the subsequent articles with regard to the time during which indictments may be quashed on grounds other than those included in *Article 202* might well be resolved by the legislature." *18 Tulane Law Review 462 (481), 1944.*

The "reductio and absurdum" of the strained interpretation of *Article 202* was finally reached in the most recent Louisiana case of *State* v. *Chianelli*, 226, La. 552, 76 So. 2d. 727, (1955), by the *Louisiana Supreme Court.*

We quote from this opinion:

> We concede that this Court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to be judicial legislation rather than judicial interpretation. Nevertheless, this Court's construction and interpretation of Article 202 in the Wilson case has been approved by this Court in two recent cases, *State* v. *Michel*, 225, La. 1040, 74 So. 2d. 207 and

State v. Labat, et al., 226 La. 201, 75 So. 2d. 333.

Article 202 of the Code of Criminal Procedure requires legislative not judicial action; but the Legislature in amending this Article should be careful not to incorporate in it any provision that would subject the statute to an attack on the ground of a denial of due process of law.

It is to be noted that the Louisiana Supreme Court quotes your petitioner's own case as authority for the interpretation of *Article 202*, which the Court itself concedes "somewhat strained" and which amounts to "judicial legislation rather than judicial interpretation".

The position above taken by petitioner is supported by an excellent comment in the Louisiana Law Review of June, 1955.

> *The present interpretation of Article 202*, as established by the Wilson case and applied to objections to petit jury venires in the Chianelli case, *is subject to criticism*. This construction in regard to objection to grand jury venires, *fails to provide for cases in which an accused is not assisted by counsel until on or after the third judicial day after the expiration of the grand jury term.*

* * * * * * *

The basic problems of statutory construction is one of ascertaining the intent of the legislature. In relation to Article 202, the generally applicable canons of statutory construction would lead to a different conclusion from that announced in the Wilson case. Thus, under the "plain meaning" rule or "rule of literalness", it is difficult to say how the phrase "of the term" could be construed as meaning "after the term." However,

since a literal interpretation would lead to the incongruous result of depriving many accused persons of the right of objecting to jury venires, the plain meaning of the langage of the statute should not be relied upon as conclusively proving the legislative intent.

. . . . . .

However, it is submitted that the court in the Wilson case *was guilty of judicial legislation.* Also, since the Supreme Court can at any time decide that the rule of the Wilson case is illogical and revert to the prior rule an accused person is at the present somewhat insecure in waiting until after the first three judicial days of the term to raise objections to the jury venire. Possibly the only solution lies in the amendment of Article 202 by the legislature. *Time for Urging Objections to Jury Lists and Venires: Article 202, Louisiana Code of Criminal Procedure. XV Louisiana Law Review 749, 751, 754.* (Italics by writer of brief.)

A complete statement of the historical backgrond of *Article 202* is presented by the late Chief Justice O'Neill of the Louisiana Supreme Court in a lengthy dissenting opinion of the case of *State* v. *Anthony Wilson* 204, La. 24, 14 So. 2d. 873, 885 (1943). Justice O'Neill concludes his opinion with the statement that the construction of *Article 202* by the majority of the Court and by the trial judge in that case "is not only contrary to the wording of the Statute and contrary to the jurisprudence on the subject but is, in fact, an impossible construction."

It is the same "impossible construction" that was relied on by the trial judge and the Supreme Court of Louisiana in your petitioner's case. See *State* v. *Labat* 226, La. 201; 75 2d. 333 (337).

We quote briefly from the Chief Justice's dissenting opinion:

> The limitation as expressed in the article (Article 202) is not applicable to this case; *but the trial judge has made the limitation applicable to this case by giving the limitation a meaning which its wording does not express, and thus, has denied the defendant the right even to make the objection that he was denied the equal protection of the laws. State* v. *Wilson, Supra* at 14 So. 2d 889. (Italics by writer of this brief).

It is, therefore, submitted that there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner the right to challenge the array, the venire and the grand jury on the ground that he was denied the equal protection of the laws. The circumstances surrounding this case certainly give rise to an inference that the law of the State of Louisiana, namely *Article 202 of the Code of Criminal Procedure* was interpreted with the specific intent to deprive your petitioner of a Federal right. Even assuming that the State Court is not guilty of an evasion and that the law of Louisiana was honestly applied, and even dictated by precedents, it is clear that the State law as interpreted by the Supreme Court in your petitioner's case throws such obstacles in the way of enforcement of his Federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

That there is at least a prima facie case on petitioner's behalf, that there has been a systematic exclusion of negroes from the jury can hardly be denied by the State of Louisiana. In fact, the judges of the Criminal District Court for the Parish of Orleans seem to take "judicial notice" of this fact by making statements for the public press to the

effect that in only one instance *in history has a negro ever served on a Grand Jury*, and that was because of a mistake, wherein a judge picked a light-skinned negro to serve on a Grand Jury under the mistaken belief that he was white. *See Appendix A & B.*

It is obvious that petitioner, as a result of "strained interpretation and "judicial legislation" by the Courts of Louisiana, has been placed in a situation, condemned by this Court in *Hernandez* v. *Texas*, 347, U.S. 667; 74 S. Ct. 667, 98 L. Ed. 866; *Carter* v. *Texas*, 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Patton* v. *Mississippi*, 332 U.S. 463; 68 S. Ct. 184, 92 L. Ed. 76.

The result of the decision of the Courts of Louisiana is to deny petitioner's right even to make the objection in Louisiana, and petitioner's plea in this Court falls within the scope of the ruling of Chief Justice Holmes in *Rogers* v. *Alabama*:

> It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. *Rogers* v. *Alabama*, 192 U.S. 226, 24 S. Ct. 257, 74 L. Ed. 870.
>
> Whatever springs the State may set for those who are endeavoring to assert rights the State confers, the assertion of Federal rights, when plainly and reasonably made is not to be defeated under the name of local practice. *Davis* v. *Wechsler* 263, U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143.
>
> It is therefore within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of a decision that were without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untena-

ble, may be then put forward successfully, our power to review may easily be avoided. *Ward v. Love County*, 253 U.S. 17, 64 L. Ed. 753.

Your petitioner, therefore, submits that this Court should assume jurisdiction as the purported non-Federal grounds upon which his case was decided by the Supreme Court of Louisiana are plainly untenable and without any fair and reasonable support, and that the law of Louisiana in *Article 202 of the Code of Criminal Procedure* as interpreted by the S. Ct. of Louisiana and specifically applied to his case should be struck down as it amounts to a *local practice* denying to him the assertion of a Federal right.

IV

In the event that this Honorable Court should see fit to grant relief to the co-defendant herein, Clifton Alton Poret, and remand his (Poret's) case so as to permit him to challenge the validity of the array, the venire and the Grand Jury for reasons asserted by said co-defendant but not asserted herein, then this Court should also remand your petitioner's case so that the indictment against him may be dismissed if his co-defendant's challenge to the legality and validity of the array, the venire and the Grand Jury is upheld.

It is to be noted that the Motions to Quash and the Bills of Exception reserved herein were Motions to set aside the array, the venire and the Grand Jury on the ground of systematic exclusion of negroes therefrom. The Louisiana law on this subject was clearly stated by the Supreme Court of Louisiana almost eighty years ago and has remained unchanged to date:

> While a motion to quash a particular indictment was limited in effect to the defendant invoking it, *a motion*

to set aside the venire, if sustained, had the effect of declaring the venire bad and illegally drawn and the jurors composing it no longer jurors, and no indictment or conviction by them would stand. State v. *Revells*, 31 La. Ann. 387 (1879). *State* v. *Smith*, 31 La. Ann. 406 (1879). (Italics by the writer of this brief).

The law of Louisiana also gives to your petitioner the right to claim the benefit of any bills of exception filed on behalf of his co-defendant during the entire proceedings:

> Codefendants, presumption as to reservation of bill of exceptions
>
> Whenever a bill of exceptions has been reserved in any criminal proceeding in which more than one defendant is on trial, it shall be presumed, unless the contrary clearly appears, that the bill has been reserved by all the defendants on trial. *Article 501, Louisiana Code of Criminal Procedure, Louisiana Statutes Annotated, R. S. 15:501.*

Without even the citation of the above authorities, it would be a manifest miscarriage of justice to remand the case of one co-defendant to permit him to assert a denial of the Federal Right of equal protection of the laws, which assertion if proved and upheld, would dismiss an indictment against him while at the same time sending the other co-defendant to his death by electrocution, when the latter co-defendant was indicted by the same Grand Jury, which is the subject of attack.

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Louisiana should be reversed and the cause remanded so as to give petitioner the right to show that he

was denied due process of law and the equal protection of the laws as guaranteed him by the Fourteenth Amendment to the Constitution of the United States, by the State of Louisiana through its administrative officials, its laws, and its courts, in systematically excluding negroes, members of his race, from the array, the venire and the Grand Jury which indicted him.

Respectfully submitted,

FELICIEN Y. LOZES,
RUDOLPH F. BECKER, JR.,
Attorneys for Petitioner.

Certificate of Service

Rudolph F. Becker, Attorney and a member of the Bar of this Court hereby certifies that a copy of the above Brief has been served on Leon D. Hubert, Esq., District Attorney for the Parish of Orleans, and upon Fred S. LeBlanc, Attorney-General for the State of Louisiana by United States Mail by depositing same in the United States Mailbox with first-class postage pre-paid, addressed to said counsel at their respective postoffice addresses.

FELICIEN Y. LOZES,
RUDOLPH F. BECKER, JR.,
Attorneys for Petitioner.

APPENDIX A

(The Times-Picayune, Thursday, February 3, 1955)

Negro May Act as Grand Juror

Judge O'Hara Notes US Supreme Court Ruling

A Negro may be named to the Orleans parish grand jury next September if the venire lists a legally qualified person of that race.

Criminal district court Judge William J. O'Hara, in a statement released Wednesday, noted that the United States Supreme Court has ruled that the exclusion of a race is unlawful.

Judge O'Hara said he will have nothing to do with the selection of the next grand jury but will select the jury taking office in September.

The next grand jury is to be named in March by Judge Niels F. Hertz.

Judge O'Hara referred to numerous attacks on the selection of grand juries and noted that decisions of the Supreme Court declare that regardless of what the grand jury selection system may be, if the facts reveal that a substantial portion of the population is Negro and no Negro has ever been selected, a prima facie case of systematic exclusion is made out.

Only one Negro has ever served on a grand jury here and he was mistaken for a white man when named to the jury, Judge O'Hara said.

Text of Judge's Statement

The text of Judge O'Hara's statement follows:

"Colored persons indicted for capital crimes in Orleans consistently make the plea that the grand jury is illegally

constituted because *no Negro has ever been selected to serve as a grand juror in Orleans parish except for one well known instance wherein a colored person who appeared to be a white person was elected as a grand juror.*

"The plea of these defendants is based upon decisions of the Supreme Court of the United States which declare that regardless what the grand jury selection system may be, if the facts are that a substantial portion of the population is colored and that no colored person has ever been selected as a grand juror for a period of time, a prima facie case of systematic exclusion of colored persons from the grand jury is made out.

Last Jury Attacked

"The last grand jury I selected was attacked because it was, like preceding grand juries, an all-white grand jury. I defended that grand jury on the ground that no colored person had ever before been selected on a grand jury, and the impending police investigation by the grand jury, and prevailing public tension was not a propitious time to place the first colored person on the grand jury.

"I have nothing to do with the selection of the next grand jury. I will select the grand jury after the next grand jury. If there are colored persons then on the venire, legally qualified for grand jury service, I will select a colored grand juror."

APPENDIX B

(New Orleans Item, Wed., Feb. 2, 1955)

First Negro Due On N. O. Grand Jury

The first Negro to serve on an Orleans Parish Grand Jury may be selected for the September term.

The Item learned today that Criminal Judge O'Hara has told lawyers he will select a Negro on the jury.

If Judge O'Hara follows through, his action may halt a barrage of appeals to the U. S. Supreme Court similar to those in three cases here in which the state is seeking the death penalty.

* * * * * * *

The U. S. Supreme Court has ruled several times that where there is a large Negro population in a community and no Negro has ever served on a grand jury, there is a violation of the 14th amendment.

But no case emanating from Orleans Parish has ever been ruled on by the U. S. Supreme Court—*and only one Negro has ever served on a grand jury here. He was appointed because the judge thought he was a white man.*

The three cases being appealed because of failure to appoint a Negro to the grand jury are:

The Robert Lea murder case.

The John Michel rape case.

The Fred Eubank murder case.

* * * * * * *

Twenty-two-year-old Robert Lea was convicted and sentenced to death for the murder of Tulane student Thomas McKenna during a French Quarter barroom hold-up.

His attorneys, both appointed by the Legal Aid Bureau and serving without pay, are John Dowling and Louis Trent.

The attorneys say they will appeal the conviction on the fact that negroes are systematically excluded from the grand jury.

Consequently, they say, the grand jury which indicted Lea was not representative of the community.

* * * * * * *

John Michel, a Negro, was convicted and sentenced to death for rape.

His case was appealed to the Louisiana Supreme Court by his court-appointed lawyers, George Fust and George Schreiber.

> The state supreme court ruled as it had previously, that if the objection to the grand jury is not raised within three days of the indictment, it is not valid.

Fust and Schreiber have asked the U. S. Supreme Court to review this state court decision.

* * * * * * *

Fred Eubank, 18-year-old Negro, is to be tried this month for the murder of an elderly woman during a robbery.

His court-appointed attorney, Herbert Garon, last month subpenaed all six ~~Orleans~~ Parish Criminal court judges.

He wanted them to testify at a hearing on a plea to quash the indictment.

> *Gist of the testimony was that none of the judges had ever selected a Negro to serve on the grand jury.*

Garon's plea to quash was overruled, but Garon has announced his intentions to appeal.

Several times in the past when this issue came up, former district attorneys would accept a lesser plea in capital cases when attorneys indicated they would attack the jury system.